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No. 97-156

In The

Supreme Court of the United States

October Term, 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, et al.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR THE RESPONDENT MAINE HUMAN RIGHTS COMMISSION

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STATEMENT

In addition to her claim under the Americans with Disabilities Act ("ADA"), Ms. Abbott filed suit alleging a violation of the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. §4551, *et seq.* The Maine Human Rights Commission ("MHRC") was permitted to intervene as a party plaintiff by the district court. The MHRC is the state governmental agency which administers and enforces the MHRA. 5 M.R.S.A. §§4611-4613. The First Circuit held in this case, as did the district court, that interpretation of the ADA and the MHRA proceeds "hand in hand" because they are analogous statutes.[1] Accordingly, Respondent MHRC joins in the Argument presented in the Brief for Respondent Abbott addressing all three questions before the Court. Without unnecessarily duplicating argument made in Respondent Abbott's Brief, the MHRC wishes to bring to the Court's attention its vital interest in ensuring that the federal and state statutes prohibiting disability discrimination are vigorously enforced.[2]

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[1] *Abbott, et al. v. Bragdon*, 107 F.3d 934 (1st Cir. 1997) (Pet. App. 2a, note 1). Both statutes prohibit public accommodations from discriminating on the basis of disability. ADA, 42 U.S.C. §12102(2); MHRA, 5 M.R.S.A. §4592.

[2] The determination of the issues before the Court in this case will significantly affect how state courts around the country interpret the many state discrimination statutes which include a definition of disability similar to that found in the ADA. *See, e.g.*, New Hampshire Law Against Discrimination, Ch. 354-A, N.H.R.S.A. §354-A:2(4) (1992); Vermont Fair Employment Practices Act, 21 V.S.A. §495(d)(5) (1993); Massachusetts Fair Employment Practice Act, Ch. 151B1 Mass. Gen. Laws, §1(17) (1992); Ohio Fair Employment Practice Law,

ARGUMENT

Respondent MHRC joins in the Argument set forth in the Brief for Respondent Abbott addressing all three questions accepted for review by the Court.

In its *amicus* brief to the First Circuit, the Bureau of Health of the Maine Department of Human Services, described its responsibility for controlling infectious diseases, including HIV,[3] and stated its belief that discrimination against people who are infected with HIV impedes its efforts to "stem the tide" of HIV transmission.[4] Discrimination by places of public accommodation and employers based on physical disability has been unlawful in Maine under the MHRA since 1974,[5] and under the

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41 Ohio Revised Code, §4112.01(A)(13) (1992); Colorado Anti-Discrimination Act, 24 C.R.S. §24-34-301(2.5)(a) (1994).

[3] Brief of the *Amici Curiae* Rhode Island Department of Public Health, Department of Public Health of the Commonwealth of Massachusetts, Bureau of Health of the Maine Department of Human Services, American Public Health Association, Association of State and Territorial Dental Directors, and Association of State and Territorial Health Officials, ("Public Health Amici Brief"), p. 1.

[4] *Id.* at 9.

[5] 5 M.R.S.A. §§4571-72 and 4592. The Maine Law Court has expressed the purpose of the MHRA to be the removal of artificial, arbitrary, and unnecessary barriers in order to "guarantee physically [disabled] persons the fullest possible participation in the social and economic life of the State." *Maine Human Rights Commission v. City of South Portland*, 508 A. 2d 948, 954 (Me. 1986), quoting L.D. 2058, Statement of Fact (106th Legis. 1974); *Maine Human Rights Commission v. Canadian Pacific Limited*, 458 A. 2d 1225, 1229 (Me. 1983).

ADA since 1992. The MHRC views the ADA as a powerful tool created by Congress to eliminate the harmful consequences of discrimination against people with physical disabilities.

In its *amicus* brief below, the Maine Bureau of Health noted the fact that people infected with HIV experience widespread discrimination when attempting to obtain dental and other health care services.[6] Specifically, studies have shown that as many as 40% of dentists stated that they would not treat an HIV-positive patient,[7] while 48% of primary care physicians surveyed have said that they will not care for patients infected with HIV.[8] In Maine and other rural states, making unavailable nearly half of health care facilities, or requiring HIV-infected patients to travel to a hospital to have a cavity filled, may often result in considerable hardship because of distance traveled, time away from work and home, and expense. In this case Dr. Bragdon stated that he expected that Ms. Abbott would be required to travel from Bangor, Maine to Machias, Maine, to have her cavity filled, a round trip of more than 100 miles. J.A. 148.

The concern expressed by public health officials is that such discrimination discourages people from getting tested for HIV and deters those who are HIV-positive from seeking needed health care or from disclosing their HIV status to their dentists and doctors. When HIV-infected people avoid the health care system because they

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[6] Public Health Amici Brief, *supra*, at 8.

[7] *Id.*

[8] *Id.* at 8, 9.

fear discrimination, they are denied education and counseling about how to prevent transmission to others.[9] The consequence is that the public health effort to control the HIV epidemic is impeded.

This result is not what Congress intended. In *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), this Court acknowledged the negative effects of society's accumulated myths and fears, prejudiced attitudes and ignorance about contagious disease, then instructed that "courts should normally defer to the reasonable medical judgments of public health officials" when considering the issue of "direct threat." *Arline*, 480 U.S. at 286 n. 15 and 288. The ADA incorporates this requirement. *See*: 28 C.F.R. pt. 36, app. B at p. 600 (1994) (deference must be given to the reasonable medical judgments of "public health officials, specifically public health authorities such as the U.S. Health Service [and] the Centers for Disease Control.") The Centers for Disease Control and Prevention (CDC) have evaluated the current medical evidence concerning risk of transmission of HIV from patient to dentist and concluded that, if universal infection-control practices for dentistry are followed, it is safe to provide routine dental care in the private dental office. *See: 1993 CDC Recommended Infection-Control Practices for Dentistry*, Pet. App. 181a-199a. And, since 1988, it has been the official position of the American Dental Association that "patients with HIV infection may be safely treated in private dental offices where appropriate infection control procedures are employed." American Dental Association *Policy Statement on AIDS-HIV Infection and the Practice of*

[9] *Id.*

Dentistry (1988: 457; 1991: 591), Appeals Court Appendix at 273. By adhering to the directive in *Arline* to defer to the reasonable medical judgments of public health officials such as the CDC, at least in the absence of "contrary properly supported opinions [of] other recognized experts in the field,"[10] the First Circuit found the proper balance intended by the ADA protecting health care providers and patients with HIV infection.

CONCLUSION

For the foregoing reasons and those in Respondent Abbott's Brief, Respondent Maine Human Rights Commission respectfully submits that the decision below should be affirmed.

Dated: February 3, 1998

Respectfully submitted,

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[10] *Abbott, supra*, at Pet. App. 12a.